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RE: Docket No. FV03-925-1PR
Federal Register Vol.70, No. 100, Page 30001
Grapes Grown in a Designated Area of Southeastern California and Imported Table Grapes; Proposed Change in Regulatory Period
COMMENTS IN OPPOSITION TO PROPOSED CHANGE

Dear Docket Clerk:

This letter is a comment on the proposed change in regulatory periods for Grapes Grown in a Designated Area of Southeastern California and Imported Table Grapes (7 CFR Parts 925 and 944), published in the Federal Register Vol. 70, No. 100, pp. 30001-30009. We are William H. Kopke Jr. Inc., an importer of grapes from Chile and other countries. In the past five years, our imports have represented approximately 10% of total imports of Chilean Grapes into the United States. We believe that our imports represent a statistically significant sample of the market, and therefore we provide statistics based upon the grapes that we have imported.

The Desert Grape Growers League of California (the "League") has requested that the effective dates of the marketing order for California and Imported grapes be changed from April 20-August 15 to April 1-July 10. To support its petition, the League makes many unsound claims and cites unscientifically selected statistics. We will endeavor to show that many of the claims made by the League are false or misleading, and the few statistics it cites are based upon scientifically invalid samples. In fact, the effects of changing the regulatory period will impose a financial burden on consumers, retailers, port facilities, logistics firms, insurance companies, customs brokers, importers, and other American businesses. This financial burden will be due to a substantially reduced supply of green grapes in April and May, which will be the main result of the change.

The Proposed Rule states:

> "The April 1 date is being proposed because this date would enable most grapes imported prior to April 1 to clear the market prior to the commencement of the southeastern California harvest and marketing season." (p.30005)

This is a clear statement that the proposed rule is a protectionist measure designed to avoid Chilean competition for a domestic industry. On September 3, 2003, President Bush signed a free trade agreement with Chile, which took effect on January 1, 2004. It is clearly the policy of our government to engage Chile economically by lifting trade barriers. It is inconceivable that less than two years later, the United States should reverse its policy and further limit Chilean imports using technical agricultural trade barriers.

The Proposed Rule states:

> "The League further contends that there would be no adverse effect on the availability and prices of grapes if the regulatory period for imports were changed to April 1" (p.30003).

However, with the current regulatory period beginning April 20, The League admits that "The League's weekly inspection summary indicates that an insignificant amount of grapes are imported after April 20" (p. 30004). This is not a coincidence. Indeed, in the past five years, we have imported exactly 0 green seedless grapes from Chile into the United States during the regulatory period. The reason is that it is too risky to submit green seedless grapes to a costly twelve-day ocean voyage, if they must be re-exported in case of failure to grade. It is certain that if the starting date of the regulatory period is changed to April 1, then there will be an insignificant quantity of green seedless grapes imported from Chile during the new regulatory period. Commercially significant quantities of green seedless grapes from Mexico or domestic sources do not generally become available until after May 15. This means that if the regulatory period is changed, then substantially the entire supply of green seedless grapes available in the marketplace during the month of April will be grapes imported from Chile during March. Since the voyage from Chile takes approximately two weeks, this means that during the latter half of April, consumers will not have fresh grapes available for purchase. This contradicts the basic rationale for quality standards: "The basic rationale for such standards is that only satisfied customers are repeat customers. Thus quality standards help ensure that consumers are presented a product that is of a consistent quality. This helps create buyer confidence and contributes to stable market conditions. When consumers purchase satisfactory quality grapes, they are likely to purchase grapes again. If they purchase poor quality grapes, they are likely to delay future purchases, which could reduce demand for all grapes." (p. 30002)

Moreover, since supplies will be limited, the price of green seedless grapes in the second half of April will be very high. In the first two weeks of the regulatory period over the last twenty years, the price of good Thompson seedless has frequently risen to above $30/box at the importer level. We can expect similar volume and price movements with the new regulatory period. It follows that in the latter half of April, consumers will be asked to pay $4/lb. for grapes that arrived in March. This is a situation that will destroy demand. It is not in the best interests of anyone—consumer, retailer, trucker, importer, or California grape grower.

Another major contention of the League is as follows: "The League contends that during the prior year, imports of grapes that did not meet marketing order requirements were on the market and were able to avoid the California grape order's grade, size, maturity, and quality requirements." We will show that there was little if any competition between imported Chilean green seedless and California green seedless. Our experience shows that Chilean Crimson seedless have little difficulty meeting the US#1 standard at arrival. Indeed, many Chilean Crimsons are imported during the regulatory period. Consequently, if the regulatory period is changed to begin on April 1, we expect increased imports of Chilean Crimson seedless to fill the void left by the Thompsons that are excluded from the market. The market naturally prefers a mix of green and red grapes. The rule will artificially distort the market and limit consumer choice.

We have examined the USDA Western Fruit Report Table Grape Supplement to determine when commercially meaningful supplies of domestic grapes first became available in the past five years. We regard a pack-out of 100,000 cases per day to be commercially meaningful. This translates to 600,000 cases of grapes per week, or approximately 25% of an average week's supply from Chile during the Chilean season:

Year	First Coachella pack-out of 100,000 boxes
2001	May 25
2002	May 16
2003	May 12
2004	May 11
2005	May 18

If we take the average of the dates in May, we obtain May 16 as the average date of first pack-out of more than 100,000 boxes.

Next, consider our sales of Chilean Thompsons sold after May 14:

Year	Percentage of our Chilean Thompson imports Sold after May 14
2001	0.14%
2002	0.11%
2003	0.08%
2004	0.02%
2005	0.54%

The average is less than one fifth of one percent. It follows that there is extremely little competition between Chilean and domestic green seedless.

Industry practice is to take USDA inspections only on fruit with condition problems at arrival. ("Based on AMS experience, importers request voluntary quality and condition inspections on grapes that appear to be of lesser quality prior to April 20…" p. 30007) Indeed, in order to retain one's rights under the PACA, USDA inspections must be taken at arrival. It follows that the sample of grapes that undergo USDA inspections is a biased sample. If one considers the percentage of grapes that fail USDA inspection, that percentage will be very high, because most importers only inspect poor grapes. These are the statistics that are used by the League. It follows that any conclusions based on these statistics are biased and they will show the grapes to be worse than the true population. For example, if we wished to determine the percentage of people in the US population who have serious illnesses, it would not be scientifically correct to take our samples only from the population of hospital patients. Yet this is exactly the methodology employed by the League.

The League wishes to change the expiration date of the regulatory period from August 15 to July 10. In support of this, it is stated that "From 2000-2004, more than 99 percent of the 8.0 million 18-pound lugs of grapes grown in the production area were handled during the period April20-July 10" (p. 30002). This uses a definition of "the production area" that is restricted to Arizona and portions of Southern California. On the contrary, only a small fraction of domestic table grapes are harvested during this period. The U.S. International Trade Commission, in its Publication 3432 (June 2001, Investigation Nos. 731-TA-926 and 927), which dismissed the antidumping complaint against Mexican and Chilean spring table grapes, specifically declined to consider domestic grapes harvested in April/May/June ("Spring table grapes") as separate or in any way distinct from domestic table grapes harvested in July and later.

> "The record does not indicate any significant differences between the table grapes produced during April, May, and June and those produced later in the year. The only apparent difference between these grapes is the timing of the harvest…Channels of distribution, manufacturing processes, and price are similar, if not identical, for Spring table grapes and table grapes grown later in the year. All table grapes move through similar channels of distribution. The production processes for Spring table grapes and table grapes grown later in the year are essentially the same and some employees work on grape harvests in both the Coachella and San Joaquin Valleys. There is no evidence that purchasers or producers perceive Spring table grapes to be significantly different from table grapes grown later in the year." (U.S. International Trade Commission Publication 3432, Investigation Nos. 731-TA-926 and 927, June 2001)."

Essentially, the U.S. International Trade Commission ruled that grapes are grapes, and one valley's grapes cannot receive special status in distinction to another valley's grapes.

The Proposed Rule states:

> "Since exporting countries can and, in fact, do export many high quality grapes to the United States prior to April 20, and have the capability to export grapes meeting minimum import requirements we would not expect a shortage of grapes in the market with an earlier effective date for section 8e import requirements" (p.30003)

The conclusion does not follow from the premise. While exporters produce very high quality grapes, it is impossible to guarantee US#1 arrival condition after a two week voyage by sea. For green seedless grapes, there is a significant risk that grapes that looked excellent at shipping point may fail to grade US#1 on arrival. Because of the enormous cost of ocean freight, which has been increasing along with the recent increases in the price of oil, exporters are reluctant to risk rejection by the USDA. That is why a very small number of green seedless grapes are now imported during the regulatory period. ("The League's weekly inspection summary indicates that an insignificant amount of grapes are imported after April 20", Federal Register p. 30004) Changing the start of the regulatory period will eliminate virtually all imports of green grapes during the month of April. There will be a corresponding decrease in supply.

The Proposed Rule states

> "Additionally USDA Market News Philadelphia Reports dated May 7,8, and 9, 2003 show that poor/ordinary condition grapes were on the market at $1 to $6 a lug. Good quality grapes from the production area were sold in various markets during that time from $24 to $29 per 19-pound lug of grapes…The domestic industry contends that it might have received higher prices due to consumer demand if the lower condition imported grapes were not competing with them during that time." (p. 30004)

The contention of the domestic industry is unreasonable. There is an entirely different clientele for $1-$6 grapes and for $24-$29 grapes. Supermarkets generally do not purchase "poor/ordinary condition" grapes. The $1-$6 sales listed in the Philadelphia market report were made to jobbers and small stores willing to expend manual labor in repacking the grapes for retail sale. The $24/$29 sales listed were to supermarkets and high-quality wholesalers.

Moreover, it is erroneous to rely on the Philadelphia wholesale market as an indicator of events in the entire United States. The majority of Chilean imports enter the U.S. through the port of Philadelphia. It is the local wholesale markets, Philadelphia being the closest one, that absorb much of the imports that arrive in "poor/ordinary condition." Prices in local wholesale markets do not reflect the national marketplace. Indeed, if we look at the USDA Los Angeles Wholesale Fruit and Vegetable report for May 9, 2003 (one of the dates listed above), Coachella Perlettes were selling for $20-$22 for medium large, and $26 for large. The prices in the local wholesale market for medium large are well below the national averages cited in the proposed rule, because this is where the grapes in poor condition go. The only reasonable conclusion from the data is that the domestic industry might have sold for higher prices to clients in the Philadelphia Wholesale market. Even this is unlikely, due to the difference in clientele listed above.

The Proposed Rule states

> "The weekly arrival summaries show that 1.6 million 18-pound lugs of imported Chilean Thompson Seedless grapes arrived at all ports during the weeks of April 1-April 19, 2004. Their arrival summaries also showed that 3,846 18-pound lugs of Chilean Thompson Seedless grapes arrived after the regulatory period began on April 20, 2004. USDA Market News Terminal Reports indicate that imported Chilean poor, ordinary, and fair condition Thompsons Seedless grapes [that probably would not meet the standards provided in the marketing order] were on various markets during the regulatory period, whereas the grapes imported during the regulatory period were subject to import requirements. From the above referenced information, USDA believes that imported Chilean grapes that were in fair, ordinary, and poor condition and that were imported prior to April 20, where stored and then marketed during May 2000, 2001, 2002, 2003, and 2004; and during June 2000, 2001, and 2004, in competition with inspected and marketing order compliant California grapes."

If we are to assume that the last contention refers to Thompson Seedless grapes, then we must disagree strongly. In our experience there are only insignificant quantities of Thompson seedless in the market after the first week of May. According to the USDS Western Fruit Report Table Grape Supplement, the average first pack-out date (of any volume) for Coachella grapes for 2001-2004 was May 7. Our firm sold approximately 0.63% of our Chilean Thompson seedless after May 7 in these years. Therefore the overlap between Chilean and domestic green seedless is almost nonexistent. Moreover, this tiny overlap is commercially insignificant. As we argued previously, commercially significant quantities of domestic grapes only enter the market on average at May 16, and less than one fifth of one percent of our Thompson seedless are sold after May 14.

It is true that commercially meaningful quantities of Chilean Crimson seedless are generally in the market until May 10. However, it is not true that commercially meaningful quantities Chilean seedless grapes are ever in the market in June. There may be a few pallets being disposed of in the wholesale markets, but the quantities are insignificant.

The Proposed Rule states:

"The domestic industry contends that it might have received higher prices due to consumer demand if the lower condition imported grapes were not competing with them during that time" (p. 30004)

And

"Without the presence of poorer condition grapes in the market, the overall quality/condition level of domestic and imported grapes should advance. Higher overall condition/quality should result in increased demand and repeat purchases." (p. 30005)

It is a basic law of economics that higher prices depress demand. Even if we assume the League's doubtful contention that the absence of poor quality grapes would raise prices for good quality grapes, we cannot therefore conclude that demand for good grapes would increase. The countervailing effect of higher prices might result in a net decrease in demand.

The Proposed Rule states:

"The League believes that the marketing of grapes of lower quality/condition (because they did not have to meet the marketing order standards) in competition with grapes that do have to meet those standards and are of a higher quality/condition tends to lower market demand and depress prices for all grapes in the market."

Key here is the word "believes". The League has apparently submitted no evidence for their belief. It is not reasonable to impose a heavy financial burden on consumers, retailers, port facilities, customs brokers, logistics firms, insurance companies, and importers, based solely upon the unsupported beliefs of a small fraction of the domestic grape industry.

The Proposed Rule states:

"The per capita consumption of fresh grapes has increased from 3.97 pounds in 1980 to 8.59 pounds in 2002. Changing the regulatory period for imports to April 1 would help better maintain quality and consumer acceptance in the marketplace, and could further increase per capita consumption." (p. 30008)

It is well-known that the existence of Chilean grapes in the winter months is mainly responsible for the increase in per-capita consumption of grapes. Grapes used to be a seasonal item, but now they are a staple. By removing three weeks from the Chilean import season (which lasts for approximately 21 weeks), a corresponding decrease in per capita consumption is to be expected, not an increase. By restricting the Chilean imports, grapes will lose shelf space in the supermarkets. When the domestic supplies are ready, grapes will have to be reintroduced to the supermarket and to the consumer.

The Proposed Rule states:

> "According to the League, table grapes from some countries exporting to the United States must meet minimum inspection requirements on a year-round basis in both the European Union and in Canada. Hence, a change in the effective date to April 1 should not affect the availability of imported table grapes because quality table grapes could easily be diverted to the U.S. market"

This may be true for "some countries" exporting table grapes to the United States, but it is not true for Chile, the origin of some 98% of the grapes in question. We routinely re-export Chilean grapes from the United States into Canada, and no inspection of any kind is required by the Canadian authorities. In many cases it is impossible to divert cargo from Europe (or other destinations) to the United States, and it is certainly never done "easily". There are many phytosanitary and other technical agricultural restrictions for importing grapes into the United States. Crops grown for Europe often may not meet these restrictions. Moreover, the Europeans prefer their "green" seedless to be amber, while American supermarkets will not buy amber grapes. So it not practical or economically feasible to divert amber grapes from Europe to the United States. Consumer preferences and technical import regulations make the diversion of cargo difficult. The diversion of cargo envisioned by the Proposed Rule is another market distortion.

We have shown that, as a matter of economics, the proposed regulation will produce not the benign effects which it intends but adverse effects for all actors participating in the sector of the economy that it seeks to regulate. Setting the pure science of economics aside, however, it should be noted that the proposed regulation contradicts the progress America has made in both political and economic philosophy in the last half century. When viewed through the lens of our free-market philosophy, the regulation appears to be a step backward from the ideals of free trade and open markets. Indeed, it flies in the face of the recently signed US-Chile Free Trade Agreement and various other treaties that have shown the world our commitment to free trade and our scorn of tariffs. In the 21st century, most Americans do not wish to embark on a path of severe restrictions on imports, for this will strain political relationships and create an atmosphere ripe for economic retaliation. The idea of hurting some people in order to help others is one of the most challenging moral issues of our time. Laws which do so should only be made with the utmost of care, and should be based on sound economics rather than hopes and wishes. A small group of growers is placing at risk the fundamental interests previously discussed. The benefits to this small group are uncertain. The negative effects of the Proposed Rule are more certain, and will apply to many more Americans: consumers, retailers, port facilities, logistics firms, insurance companies, customs brokers, importers, and many others.

We have made the following major arguments:

1. The Proposed Rule is a protectionist measure that contradicts the policies of the United States government as exemplified by the Chilean Free Trade Agreement, which was signed and ratified only two years ago.

2. If the proposed rule takes effect, there would be a substantial decrease in the supply of green seedless grapes during the month of April.

3. The effects of the Proposed Rule will not be as claimed, because (a) there is almost no competition between Chilean and domestic green seedless grapes, and (b) Chilean Crimson seedless overwhelmingly arrive in US#1 condition.

4. Governmental distinction between the Arizona and Coachella Valley as opposed to the rest of the domestic industry makes no sense, and has been specifically been repudiated by the U.S. International Trade Commission.

5. Exporters cannot easily divert "good quality" grapes from other destinations to the United States. The risk of rejection by the USDA makes imports of green seedless financially infeasible during the regulatory period. Moreover consumer preferences in other countries are different from ours, making products destined for other countries often unsaleable in this market. Other technical agricultural restrictions, such as different phytosanitary rules, packaging requirements, and buyer specifications on imports of grapes into the United States make fruit grown for other destinations difficult or impossible to import into the United States.

6. The Proposed Rule makes conclusions about the national grape market based upon the existence of tiny supplies of poor quality imported grapes in wholesale markets geographically close to the port of arrival.

7. The Proposed Rule in many cases expresses beliefs or hopes about the future which cannot be substantiated and are open to significant doubt.

8. The Proposed Rule will likely result in a decrease in per-capita consumption of grapes, especially by the poorest Americans, who will be unable to afford this healthful snack in the month of April.

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